IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 11.06.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.412 of 2001

M/s Akkammal Finance(P)Ltd
represented by its Director
Mr.R.Raghupathi .. Appellant/Complainant

vs.

J.Chelliah .. Respondent/Accused

Prayer: This appeal has been preferred against the Judgment dated 20.12.2000, in C.C.No.7638 of 1999 on the file of IX Metropolitan Magistrate, Saidapet, Chennai.

For Appellant : Mr.N.Nagu Sah

For Respondent : Mr.V.Bhiman

JUDGMENT

This appeal has been preferred against the judgment in C.C.No.7638 of 1999 on the file of IX Metropolitan Magistrate, Saidapet, Chennai.

2. The complainant, who has lost the case before the trial Court has approached this court by way of this appeal. The complainant has filed a petition under Section 200 of Cr.P.C. against the accused for an 0ffence punishable under Section 138 of Negotiable Instruments Act,1881(hereinafter referred to as " the Act") alleging that the accused had borrowed a sum of Rs.45,000/- from the complainant on 28.7.1997 and to discharge the portion of the said amount, the accused had drawn the impugned cheque for Rs.23,000/- on 20.2.1999 in favour of the complainant and when the impugned cheque was presented on 7.7.1999 for collection with City Union Bank, Chinmaya Nagar Branch, the same was returned with an endorsement, the drawer had instructed the bank to stop payment for the cheque. A notice was sent to the accused on 14.7.1999. The accused neither sent any reply nor repaid the amount.

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3. The complaint was taken on file by the learned Judicial Magistrate, after taking cognizance of the same and after the accused appearing on summons, copies under Section 207 of Cr.P.C were furnished and when the offence was explained to the accused, he pleaded not guilty.

4. On the side of the complainant, P.Ws 1 to 3 were examined and Exs P1 to P10 were marked.

5. P.W.1 is the complaintant. According to him, under Ex P1, the accused had borrowed a sum of Rs.45,000/- from the complainant and had drawn Ex P2 impugned cheque dated 20.2.1999 for a sum of Rs.23,000/- towards partial discharge of the abovesaid loan. When the said cheque was presented on 7.7.1999 for collection in the City Union Bank, Chimmaya Nagar Branch, the same was returned on 9.7.1999 with an endorsement that the drawer of the cheque had advised the bank to stop the payment. Exs P3 and P4 are the advice of the bank sent along with Ex P2 dishonoured cheque. Under the original of ExP5, a notice was issued by the complainant to the accused on 16.7.1999 and 21.7.1999. Under ExP7, the accused had received the said notice,but not chosen to send any reply.

5a) P.W.2 is the Officer of the City Union Bank. According to him, the complainant is having a Current Account NO.1368 in their bank and Ex P2 impugned cheque was presented on 8.7.1999 for collection by the complainant and when the same was forwarded to HDFC Bank, Anna Nagar Branch, the same was returned with an endorsement that the drawer had advised the bank to stop payment. Ex P4 is the debit advice .Ex P9 is the statement of account relating to the current account maintained by the complainant. Ex P8 is the authorisation letter given to P.W.2 by the Manager.

5b. P.W.3 is the officer of HDFC Bank, Anna Nagar Branch. Ex P.10 is the authorisation letter authorising him to give evidence on behalf of the bank in the said case. According to him, the accused Chelliah, is having a savings Bank account with their bank and Ex P2 impugned cheque was forwarded to the bank for clearance on 8.7.1999. But on that date, a sum of Rs.305/37ps alone was in credit in the account of the accused and on the advise of the drawer of Ex P2 impugned cheque, the cheque was returned with an endorsement that the drawer had instructed the bank to stop payment. Ex P11 is the statement of account relating to S.B. Account No.27953 of the accused.

6. When the incriminating circumstances were put to the accused, he denied his complicity with the crime.

7. After going through the evidence both oral and documentary, the learned trial Judge has come to a conclusion that the

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complainant has failed to prove the guilt against the accused to warrant conviction under Section 138 of the Act and accordingly acquitted the accused from the charges levelled against him. Aggrieved by the findings of the learned trial Judge, the complainant has preferred this appeal.

8. Now the point for determination in this appeal is whether the findings of the learned trial Judge is liable to be set aside for the reasons stated in the memorandum of appeal?

9. Heard Mr.N.Nagu Sah, learned counsel for the appellant and Mr.V.Bhiman, learned counsel for the respondent and considered their rival submissions.

10.The Point:
The learned counsel appearing for the appellant would contend that the learned trial Judge on the ground that the impugned cheque Ex P2, dated 20.2.1999 was presented in the bank for collection only on 7.7.1999 and that there was no explanation forthcoming from the side of the complainant for the inordinate delay in presenting the impugned cheque Ex P2 for collection, forgetting the fact, under Section 138(a) of the Act, the payee/complainant or the holder in due course of the cheque is entitled to present the cheque to the bank within a period of six months from the date on which it was drawn or within a period of its validity, whichever is earlier.

10a. Even according to the evidence of P.W.1, the impugned cheque was presented for collection on 7.7.1999 itself, the City Union Bank, Chimmaya Nagar Brach wherein the complainant is having his current account No.1368 as spoken to by P.W.2. So within six months as provided under Section 138(a) of the Act, the complainant has presented the cheque from the date of drawal of the cheque for collection. Under such circumstances, the observation of the learned trial Judge that the complainant has presented the cheque after inordinate delay of more than five months cannot be a ground for rejecting the claim of the complainant in toto.

10b) The next limb of argument raised by the accused/respondent in defence before the trial Court which was accepted by the learned trial Judge is that on the date of drawal of the impugned cheque ie., on 20.2.1999, the accused was having sufficient fund in his account ie., Rs.29,774/42ps as evidenced by the deposition of P.W.3, the Officer of HDFC Bank, Anna Nagar Branch, wherein the accused is having his saving bank Account. A careful reading of the evidence of P.W.3 will go to show that in the cross examination , P.W.3 has admitted that on 20.2.1999/-, the amount in credit in the account of the accused was Rs.29,774/42ps but in the re-examination, he would admit that even on 21.2.1999, a sum of Rs.29,776/42ps was the amount in credit in the account of the accused. But he would admit in the

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re-cross examination with permission that on 22.2.1999 there was only a sum of Rs.1226/42ps was in the credit in the account of the accused. So it is clear from the evidence of P.W.3 that after the drawal of the cheque for Rs.23,000/- on 20.2.1999, the accused had withdrawn about Rs.28,000/- from his account on 22.2.1999 ie., within two days after the drawal of the cheque without even ascertaining the complainant whether the cheque drawn by him under Ex P2 was presented before the bank for collection, to show his bonafides.

11. The learned counsel appearing for the respondent/accused would contend that only after he came to know that there is no sufficient fund in his account, he has advised the bank to stop payment for the cheque and this itself would go to show that he has no mens rea to deceive the complainant. The answer to this defence, in in the ratio decidenti of the Honourable Apex Court in Goa Plast(P) Ltd.,-v- Chico Ursula D'Souza(2004)2 Supreme Court Cases 235) . The short facts of the above said case is that accused/respondent issued ten post dated cheques for Rs.40,000/- each in favour of the appellant company for payment towards the liability of the amount misappropriated from the funds of the appellant. Thereafter, the accused wrote a letter to the company denying liability to pay the aforesaid sum and shifted the responsibility for the same on a third person. The appellant deposited the first cheque for encashment. The said cheque was dishonoured by the bank on the ground that the accused had issued instructions to stop payment. The appellant sent a legal notice to the accused regarding the dishonour of the cheque and demanded payment of Rs.40,000/- within fifteen days . Since the accused did not comply with the aforesaid notice, a complaint was filed against him for the offence punishable under Section 138 of the Negotiable Instruments Act. In the above said case, the accused did not enter into the witness box to subject himself for cross examination. Under such circumstances, the Apex Court rejecting the defence raised by the accused was observed as follows:

> "Both the Courts below failed to consider the important aspect as to the stop payment instructions issued by the accused-respondent. . Ordinarily, the stop payment instructions are issued to the bank by the account-holder when there is no sufficient amount in the account. In the present case, the reason for stopping the payment, however, could be manifold. It is essential that to issue stop payment instructions there must be funds in the accounts in the first place. On this aspect, the Courts below have failed to see whether as on the date of signing of the cheque dated 20.7.1992, the date of presentation of the cheque dated

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10.1.1993, the date of writing of the letter dated 12.2.1993, and the date on which stop payment instructions were issued to the bank, the respondent had sufficient funds in the account. Both the courts below have held that after issuing the letter, the respondent has stopped the payment, therefore, no mala fide can be attributed. The learned Judicial Magistrate disallowed the application made by the complainant to the Bank Manager to ascertain whether or not there was sufficient amount in the account for the payment. Had the Bank Manager been examined, it would have been clear whether the account had sufficient amount to pay the amount of the cheque or not. It would have also enabled to know on what date stop payment order was sent by the drawer to the bank. The learned Magistrate committed a serious mistake in not allowing the application and the proceedings passed thereon have suffered from serious infirmity going to the root of the matter. The respondent was otherwise admitting the liability when the cheques were being issued. This was sufficient evidence to prove that there was a liability and as per the presumption under Section 139 of the Act, the cheques issued, therefore, were towards the liability even as per the version of the respondent.... . . . . .Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the

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same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment, it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd.v.Kuchil Kumar Nandi(1998)3 SCC 249). On same facts is the decision of this Court in Ashok Yeshwant Badave.v.Surendra Madhavrao Nighojakar (2001) 3 SCC 726). The decision in Modi Case overruled an earlier decision of this Court in Electronics Trade and Technology Development Corpn Ltd., v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739:1996 SCC(cri)454) which had taken a contrary view. We are in respectful agreement with the view taken in Modi case(1998)3 SCC 249). The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.. . . . . .We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both,. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act.. ... We , therefore, grant one

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month's time from this date to the respondent herein to pay a sum of Rs.80,000(twice the amount of the cheque) by way of demand draft in favour of the appellant and payable at Goa(on the address given in the paper book) In default, thereof, the respondent shall suffer simple imprisonment for six months."

Under such circumstances, I am of the view that the ratio of the Honourable Apex Court in the abovesaid decision, will squarely applicable to the present facts of the case.

12. Following the principle enunciated in the above said dictum,I am of the view that instead of giving any sentence, the accused can be directed to pay twice the amount of the cheque in this case also. The point is answered accordingly.

13. In the result,the appeal is allowed and the Judgment in C.C.No.7638 of 1999 on the file of IX Metropolitan Magistrate, Saidapet, Chennai is hereby set aside. The accused is convicted under Section 138 of the Act and one month's time from the date of receipt of a copy of this order is given to the respondent/accused herein to pay a sum of Rs.46,000/-(Rupees Forty Six thousand) only (Twice the amount of the Cheque) to the appellant/complainant. In default, thereof, the respondent/accused shall suffer simple imprisonment for six months.

14. In the above lines, the appeal is disposed of.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

sg

To,

1.The IX Metropolitan Magistrate, Saidapet, Chennai.
2. -do- the Chief Metropolitan Magistrate, Egmore, Chennai.

1 cc to Mr.N. Nagu Sah, Advocate, sr. 33447
1 cc to Mr.V. Bhiman, Advocate, Sr. 33656

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